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No. 82-2017

In The

Supreme Court of the United States

October Term, 1982

JOSEPH N. MARTIN,

Petitioner,

v.

J. P. MITCHELL, WARDEN, and
J. MARSHALL COLEMAN, ATTORNEY GENERAL,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether it is a *per se* constitutional violation for a jury to ask spontaneous, non-prejudicial, uncensored questions during a criminal trial, at the invitation of the prosecutor, and without any predetermined plan for testing the propriety of those questions in a manner which safeguards the defendant's Sixth and Fourteenth Amendment right to a fair trial by an impartial jury.

2. Whether a trial court's failure to conduct a minimal jury inquiry concerning the potential impact of a rhetorical, non-prejudicial campaign brochure mailed to the jurors and discussing the very trial on which they were sitting is a *per se* violation of the right to fair trial by an impartial jury.

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PRELIMINARY STATEMENT

The Respondents respectfully pray that a writ of certiorari to the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on April 11, 1983 not be granted.

OPINION BELOW

The judgment of the United States Court of Appeals for the Fourth Circuit is an unpublished opinion reported as *Joseph N. Martin* v. *J. P. Mitchell, Warden; J. Marshall Coleman, Attorney General* (Record No. 82-6579) (4th

Cir. April 11, 1983)) found in the Petition for Certiorari at App. 1A. This final judgment affirmed the Order and Opinion of the United States District Court for the Eastern District of Virginia, denying the Petitioner's petition for a writ of habeas corpus. This opinion can be found at page 5A. of the Appendix to the petition for a Writ of Certiorari.

JURISDICTION

Petitioner asserts that the jurisdiction of this Court to issue the writ of certiorari is grounded upon 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE[1]

The evidence at Martin's trial revealed that he was an insurance agent for New York Life Insurance Company and was about to be promoted to assistant manager. In order for Martin to receive as high a salary as possible as assistant manager, he devised a scheme to boost his sales of bogus insurance policies to inflate his base salary when he became assistant manager. His base salary as assistant manager was dependent upon his earnings as a salesman. To fund Martin's scheme he attempted to obtain the proceeds of a life insurance policy he wrote on Alan Foreman. He did this through an elaborate investment scheme where he made it appear that Alan Foreman and others were involved in an investment. An insurance policy issued on Foreman naming one of the investors (Silcox) as beneficiary was part of the business deal. Foreman was not aware that such a policy

[1] The Respondents do not agree with the Petitioner's Statement of Facts. The Respondents, however, will not attempt to correct the Statement of Facts on those points which are not pertinent to the issues before the Court.

had been issued. Indeed, there was in fact no business deal. Martin had attempted to get people he knew to say that they had invested money with him in some business deal. After Foreman's death, Martin would obtain the proceeds of the policy from Silcox, explaining to him it was to pay off the other "investors".

Thereafter Martin approached Richard Lee Earman in hopes of finding a "hit man" for Foreman. (Tr. Nov. 5, 1979, pp. 11-13, 15-20). Martin advised Earman that he was working for someone else. Earman made several unsuccessful attempts to find a "hit man." (Tr. Nov. 5, 1979, 26-30). Earman decided to do the job himself and made several attempts which ended with the murders of Alan W. Foreman and Donna Shoemaker. (Tr. Nov. 5, 1979, pp. 49-94). Earman was tried for his part in the murders but was acquitted.

Earman thereafter turned state's evidence and testified against Martin at his trial. Martin was found guilty after a lengthy trial and was sentenced accordingly.

After the jury was selected, the court instructed the jury not to read any material related to the case. After it was brought to the court's attention during the trial that a political brochure had been mailed to registered voters, the court again advised the jury not to read any such campaign brochures.[2] The trial judge examined the campaign brochure and determined that it was not prejudicial because it did not name the Petitioner or state anything prejudicial to him. (Tr. Nov. 5, 1979, p. 5). The court in its discretion determined not to make inquiry with the jury whether they had read the brochure because there was nothing prejudicial.

The witnesses at trial testified about the material contained in the brochure. William Burroughs testified about

[2] Tr. Oct. 25, 1979, pp. 206-207, 235; Tr. Nov. 2, 1979, p. 68.

his involvement with Martin, the numerous meetings, and his obvious belief that what Martin told him was true. (Tr. Dec. 3, 1979, pp. 20-104). He nolle prossed Martin's cases. Sidney Ploss also testified about Martin's relationship to Burroughs. (Tr. Nov. 29, 1979, pp. 6-7).

Counsel for Martin at trial brought out, through Kaya Ploss on cross-information, information concerning the police investigation of Earman's trial and the Attorney General's investigation. (Tr. Nov. 29, 1979, pp. 96-98). Richard Lee Earman testified that the theory of the Commonwealth's Attorney shifted during the trial of his case and that he (Earman) was allowed to go to the Bahamas after he confessed. (Tr. Nov. 5, 1979, p. 118).

Martin's trial lasted approximately seven weeks, and the transcript consists of several thousand pages. During the trial, jurors asked questions of witnesses and of the court which mostly dealt with clarifications of testimony, temperature of the courtroom, and matters which were obviously not contested. Over the course of the seven-week trial, some thirty-eight questions were asked by the jurors.[3]

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[3] In the court below, Martin listed the instances of questions as occurring as follows at transcript pages:

Oct. 26, 1979, pp. 12, 56, 60-63, 85, 114, 123, 135, 139;
Oct. 29, 1979, p. 35, 146-147, 171, 174;
Oct. 30, 1979, pp. 28-29, 31-32, 66, 73-74;
Nov. 1, 1979, pp. 12, 83-84;
Nov. 5, 1979, p. 153;
Nov. 8, 1979, p. 448;
Nov. 14, 1979, pp. 66-67, 112;
Nov. 15, 1979, pp. 24, 77-78, 146, 197;
Nov. 19, 1979, pp. 155, 160-161;
Nov. 19, 1979, p. 12, 20-21;
Nov. 20, 1979, pp. 144-145;
Nov. 29, 1979, p. 140;
Dec. 3, 1979, pp. 43, 119-123;
Dec. 3, 1979, pp. 34-44;
Dec. 4, 1979, p. 5;
Dec. 5, 1979, pp. 10-11, 154.

In its Memorandum Opinion the District Court found that "A review of the transcript reveals that these questions, while irrelevant, were, for the most part, innocuous. In no instance did either the question or the answer seriously prejudice the petitioner. Nor can this Court find that the procedure so promoted rapport between the prosecutor and the jury that the Petitioner was denied an impartial trial." (A. 15A.).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I.

The Petitioner's Claims Are Not Properly Before This Court.

The Petitioner's claims, as originally made in the Virginia Supreme Court, were as follows: "The trial court committed reversible error in allowing random, uncensored questioning by jurors in open court." And, "It was an abuse of the trial court's discretion to deny appellant's motions for a change of venue or continuance, and later for mistrial, prompted by the highly prejudicial publicity and controversy surrounding appellant's trial." In the United States Court of Appeals for the Fourth Circuit, the Petitioner framed his issue as "The appellant's trial was unfair and violated his due process rights because jurors were encouraged to ask random, uncensored questions in open court", and "failure to order a mistrial or at least to examine the jurors concerning a highly prejudicial political mailing sent to them during appellant's trial is reversible error and demonstrates the trial court's blatant disregard for appellant's right to a fair and impartial trial."

It appears that the Petitioner is now complaining that it was a *per se* constitutional violation for the jury to ask spon-

taneous, uncensored questions during a criminal trial,[4] and that it was a *per se* constitutional violation for the court to fail to make inquiry with the jury concerning the political campaign brochure mailed to jurors prior to trial.

It is clear that this Court will not decide federal constitutional issues for the first time on review in certiorari. *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969). Neither the state court nor the United States Court of Appeals has decided the issue now presented by the Petitioner. The issues before the Virginia Supreme Court were based on state law. The Virginia Supreme Court has consistently ruled that it will not notice any objection requiring a ruling of the trial court unless the ground of objection was stated with reasonable certainty at the time of the ruling, and that only errors assigned will be ruled upon. Rule 5:21, *Rules of the Supreme Court of Virginia; Clarendon House* v. *Helfert,* 213 Va. 28, 189 S.E.2d 331 (1972); *Rice* v. *Commonwealth,* 212 Va. 778, 188 S.E.2d 196 (1972); and *Manley* v. *Commonwealth*, 211 Va. 146, 176 S.E.2d 309 (1970).

In *Beck* v. *Washington*, 369 U.S. 541 (1962), the defendant claimed that the Washington statute permitting persons in custody to challenge grand jurors denied equal protection to persons not in custody who were investigated by grand juries. In refusing to rule upon the issue, this Court held that:

> [T]his point is not properly before this court. Although both opinions of the Washington Supreme Court discuss the interpretation of § 10.28.030, neither considered that question in light of the equal protection argument for that argument was never properly presented to the court in relation to this statute.

369 U.S. at 549.

[4] Petitioner's complaint that the questions by the jury allowed the prosecutor to establish rapport with the jury was not raised at trial.

The Virginia Supreme Court has never been called upon to determine the constitutional challenges Petitioner asserts. Nor was the United States Court of Appeals for the Fourth Circuit asked to consider the questions now presented to this Court in the petition for certiorari. Consequently, the issues of constitutional dimensions are not properly before this Court, and this Court should not exercise jurisdiction over such issues when neither the Virginia courts nor the lower federal courts have passed on them. *Illinois* v. *Gates*, 51 U.S.L.W. 4709, 4711 (June 8, 1983).

There is no substantial federal question presented for review to this Court, and the issues do not warrant this Court's attention.

> A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

Rule 19, *Rules of the Supreme Court of the United States.*

In regard to the issues which have been presented, the Respondents submit that the issues involve procedures which are more properly left to determinations under state law. Indeed, counsel for Petitioner told the state trial court with regard to the jury questions and the *procedures* followed; "I do not think any of the jurors have shouted out a question without first being recognized by the court or Mr. Caruthers [the prosecutor]." (Tr. Dec. 7, 1979, p. 33.) Petitioner's complaint at present concerning the procedure used by the court on jury questions was thereby waived. *Wainwright* v. *Sykes,* 433 U.S. 72 (1977).

II.

The Juror Questions Did Not Prejudice The Petitioner At Trial

The issue of whether a juror should be entitled to ask either counsel or witness a question is a matter which relates solely to state law and does not raise a federal constitutional question. *See, generally, Garner* v. *Louisiana,* 368 U.S. 157, 166 (1961). Under Virginia law, the denial of the petition for a writ of error by the Virginia Supreme Court is a ruling that the method of questioning by the jury was proper under state law. *See Saunders* v. *Reynolds,* 214 Va. 697, 204 S.E.2d 421 (1974).

Martin's complaint that the procedure employed by the court which allowed random jury questions violated his right to a fair trial was preserved by objection at trial; however, he failed to preserve objections to the possible prejudicial effect of any of the individual questions asked. Therefore, the Petitioner has failed to preserve any claims regarding the individual questioning under the doctrine of *Wainwright* v. *Sykes,* 433 U.S. 72 (1977). Indeed, Martin, in his petition for writ of certiorari, has not complained that any of the questions asked by the jurors were prejudicial:

> Petitioner does not contend that his trial was unfair because some questions were virulent rather than innocuous. Rather, he suggests that if a jury in a criminal case is allowed to ask questions of witnesses, counsel and the court, it should neither be as a response to a prosecutor's invitation or done spontaneously, and uncensored and in open court.

Petition for Certiorari, at page 14.

Because no prejudice is alleged and none has been found, this allegation should be denied. Indeed the District Court

found that none of the questions seriously prejudiced the Petitioner, nor did the procedure so promote rapport between the prosecutor and the jury that the Petitioner was denied an impartial trial. *See* App. 15A. of the Petition for Certiorari. The findings by the Virginia Supreme Court by its denial of the petition for writ of error and the District Court's findings of fact should be accepted. The state court denial for a petition for a writ of error should be accepted under the doctrine of *Sumner* v. *Mata*, 449 U.S. 539 (1981), and the District Court's findings should be accepted because they are not clearly erroneous. *See Summers* v. *Watkins Motor Lines*, 323 F.2d 120 (4th Cir. 1963); *United States* v. *Bethea*, 598 F.2d 331 (4th Cir. 1979).

In the court below the Petitioner cited each instance where he felt that the jury questions prejudiced his case. In this Court, however, the Petitioner has alleged no instance of any prejudice as result of any juror questions. Respondents contend that none of the questions asked by any of the jurors in the seven-week trial were in any way prejudicial. Most of the questions dealt with clarifications of a witness' testimony, temperature of the courtroom, and matters which were obviously not contested.[5]

Questions by jurors and the procedure to be employed should be a matter left to the discretion of the state system, and this Court should not attempt to fashion a rule as to the procedure to be employed when a juror has a question. The only time a constitutional issue may be raised is where a defendant has been prejudiced by an improper question. There was no prejudice as result of the questioning by the jurors in this case, and, therefore, this Court should not entertain the Petitioner's claim.

[5] In those few instances where the question could have had an adverse impact on the jury, the court discussed the situation with counsel outside the jury's presence.

There are a few federal cases discussing the issue of questioning by jurors. In *United States* v. *Witt,* 215 F.2d 580 (2d Cir.), *cert. denied,* 348 U.S. 887 (1934), the court held that the procedure of allowing jurors to ask questions of witnesses was discretionary with the court. *See also United States* v. *Gonzales,* 424 F.2d 1055 (9th Cir. 1970).

Whether to allow questions by jurors was discussed in *United States* v. *Callahan,* 588 F.2d 1078, 1086 (5th Cir.), *reh. denied,* 591 F.2d 1343, *cert. denied sub nom., Callahan* v. *United States,* 444 U.S. 826 (1979):

> Callahan claims that the procedure of encouraging jurors to ask questions invades the province of trial counsel and distorts the proper roles of counsel, judge and jury.
>
> There is nothing improper about the practice of allowing occasional questions from jurors to be asked of witnesses. If a juror is unclear as to a point in the proof, it makes good common sense to allow a question to be asked about it. If nothing else, the question should alert trial counsel that a particular factual issue may need more extensive development. Trials exist to develop truth. It may sometimes be that counsel are so familar with a case that they fail to see problems that would naturally bother a juror who is presented with the facts for the first time.

The court went on to hold that the procedure employed by the trial court in this case (to require the jurors to put their questions in writing) was not an abuse of discretion. It appears that the federal rule on juror questioning is a matter of discretion with the trial court. The Respondents contend that this Court should not adopt any hard and fast constitutional rule that would require jurors to submit their questions in writing prior to the question being asked. Certainly this Court should not reverse this case when the

Petitioner can point to no questions which were prejudicial to his case.

In the case at bar the trial lasted some seven weeks. In the court below, Martin only alleged a total of thirty-eight instances where jurors asked any questions. Certainly in a complex and lengthy trial, as was the case at bar, these few questions concerning clarifications and matters which did not affect the outcome of the trial, or prejudice Martin, were proper.

There is a detailed review of this issue in 31 A.L.R.3d 872. It appears that most states allow juror questions, and generally the trial court's discretion will not be reversed unless clearly erroneous. Respondents contend that the state court's discretion in this case was exercised properly, and that the District Court's finding was not clearly erroneous. Therefore, this allegation should be rejected.

The cases from the various state courts cited by Martin in his petition are inapposite. Most of the cases do not absolutely forbid juror questions; they only require that the court exercise discretion. Only one case cited by Martin, *Stinson* v. *State,* 260 S.E.2d 407 (Ga. App. 1979), outlaws jury questions. The Respondents contend that the Georgia rule forbidding juror questions may be violative of due process. A defendant may complain he has been denied a fair trial where he is not allowed to ask questions. *See Carter* v. *State,* 234 N.E.2d 650 (Ind. 1968).

A trial court has the duty to see that justice is done. It is proper for the court to allow jury questions in order that they might have a fuller understanding of the case. In that way they may be able to render a verdict that will do justice to the parties.

III.

The Jury Was Impartial

Whether the trial court is required to examine the jury because of media influences which occur during the trial is a matter which is discretionary with the court. The trial court exercised its discretion after it made findings that the brochure was not directly related to the Petitioner's case. The Petitioner was not mentioned in the brochure, nor were any of the circumstances regarding the Petitioner's trial evident. The Respondents contend that the trial judge's findings are fairly supported by the record and should be accepted by this Court. *Sumner* v. *Mata, supra. See also Maggio* v. *Fulford,* 51 U.S.L.W. 3869 (June 6, 1983). Additionally, the District Court's opinion is not clearly erroneous and, therefore, should not be disturbed.

The jury in the Petitioner's trial was selected with little difficulty concerning pre-trial publicity. The record also reveals that the Court had previously instructed the jury prior to the campaign brochure being mailed not to read anything related to the case, and the Court advised the jury after the campaign brochure was mailed not to read any such campaign brochures.

The trial court, in the exercise of judicial discretion, made the correct decision not to question the jurors. The Court was particularly careful, both prior to this incident and thereafter during the seven-week trial, to daily instruct the jury not to read anything related to the case. It is presumed that the jury will follow the court's instructions. *United States* v. *Pomponio,* 517 F.2d 460, 463 (4th Cir.), *cert. denied,* 423 U.S. 1015 (1975).

The trial court made the correct decision not to make inquiry with the jury because the brochure made no mention of Martin, his trial, or anything factually concerning

the murders. Because the brochure was not in and of itself prejudicial, its viewing by a juror would not have deprived Martin of a fair trial.

Other cases where the jury is exposed to news accounts or information which may be deemed prejudicial and the court made no inquiry of the jury have not presumptively deprived a defendant of due process. *See United States* v. *Ricardo,* 619 F.2d 1124, 1132 (5th Cir. 1980); *United States* v. *Grande,* 620 F.2d 1026, 1031 (4th Cir. 1980); *United States* v. *Wenzel,* 311 F.2d 164, 170 (4th Cir. 1962).

United States v. *Taylor,* 569 F.2d 448, 454 (7th Cir.), *cert. denied,* 435 U.S. 952 (1978), cited by the Petitioner, is more supportive of the Respondents' position than his own. In *Taylor,* there were prejudicial news reports about which the court did not make inquiry of the jury. The Seventh Circuit found that it was not plain error. Certainly the information in *Taylor* was more prejudicial to him than the brochure is to Martin in this case.

This Court should deny certiorari on this issue because the alleged material was not prejudicial. Such being the case, the Court need not make inquiry of the jury. *See Thompson* v. *Commonwealth,* 219 Va. 498, 504, 247 S.E.2d 707 (1978); *United States* v. *Hankish,* 502 F.2d 71, 77 (4th Cir. 1974); *Martin* v. *United States,* 528 F.2d 1157, 1158 (4th Cir. 1975).

Because the trial court made the initial determination that the brochure did not rise to the level of substantial prejudice, and the record supports that determination, this Court should not disturb that finding. *Cf. Sumner* v. *Mata, supra.*

Contrary to the Petitioner's assertion that the brochure contained materials which were not admitted at trial, there was nothing contained in the brochure that was not already

known to the jury by the evidence adduced at trial. Therefore, the trial court made the correct decision in not making inquiry of the jury as to whether they had seen the brochure, which contained nothing prejudicial to the Petitioner. Accordingly there is no merit to this complaint.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 23rd day of September, 1983, 3 copies of the foregoing Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit was mailed to Stephen J. Cribari, Esquire; Ronald A. Goodbread, Esquire, CATE & GOODBREAD, P.C., 1776 K. Street, N.W., Suite 900, Washington, D. C. 20006, Counsel for Petitioner.

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